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November 15, 2012

BY HAND DELIVERY

Ms. Cynthia Brown
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Office of Proceedings
Surface Transportation Board
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Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

NOV 16 2012

Part of
Public Record

Re: STB Finance Docket No. 35557, *Reasonableness of BNSF
Railway Company Coal Dust Mitigation Tariff Provisions*

Dear Ms. Brown:

Enclosed for **FILING UNDER SEAL** in the above-referenced proceeding, please find a separately packaged original and ten (10) copies of the Reply Evidence and Argument of Western Coal Traffic League, American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association (collectively referred to as "Coal Shippers"). Each copy of this filing includes an electronic disk with the Highly Confidential version of Coal Shippers' Reply Electronic Addenda. These disks also include a pdf copy of the Highly Confidential Version of Coal Shippers' Reply Evidence and Argument.

Additionally, enclosed are an original and ten (10) copies of a **REDACTED, PUBLIC** version of Coal Shippers' Reply Evidence and Argument for filing on the Board's public docket. Each redacted copy of the filing includes an electronic disk with the Public version of Coal Shippers' Reply Electronic Addenda. ✓

Finally, we have enclosed an additional copy of each filing to be date-stamped and returned to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,

Stephanie M. Archuleta
Stephanie M. Archuleta

Enclosures

- PUBLIC VERSION -
CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION
HAS BEEN REDACTED



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

REASONABLENESS OF BNSF RAILWAY)
COMPANY COAL DUST MITIGATION)
TARIFF PROVISIONS)

Finance Docket No. 35557

**REPLY EVIDENCE AND ARGUMENT
OF WESTERN COAL TRAFFIC LEAGUE, AMERICAN PUBLIC POWER
ASSOCIATION, EDISON ELECTRIC INSTITUTE AND NATIONAL RURAL
ELECTRIC COOPERATIVE ASSOCIATION**

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Dated: November 15, 2012

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**REPLY EVIDENCE AND ARGUMENT
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ASSOCIATION, EDISON ELECTRIC INSTITUTE AND NATIONAL RURAL
ELECTRIC COOPERATIVE ASSOCIATION**

In response to the Surface Transportation Board's ("STB" or "Board") decision served in this proceeding on July 31, 2012, the Western Coal Traffic League ("WCTL"), American Public Power Association ("APPA"), Edison Electric Institute ("EEI") and the National Rural Electric Cooperative Association ("NRECA") (collectively "Coal Shippers") present the following joint reply evidence and argument.

PREFACE AND SUMMARY

In Dust I,¹ the Board found that BNSF's publication of the Original Coal Dust Tariff² constituted an unreasonable practice. The Board then admonished BNSF to

¹ *Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, STB Finance Docket No. 35305 ("Dust I").

² "Original Coal Dust Tariff" refers to Item 100, entitled "Coal Dust Mitigation Requirements," initially published on April 30, 2009 in Revision 011 to BNSF's Price List 6041-B and Item 101, entitled "Coal Dust Requirements Black Hills Sub-Division," initially published on May 27, 2009 in Revision 012 to BNSF's Price List 6041-B.

work cooperatively with its coal shippers to address coal dust issues.³ BNSF ignored the Board's request and proceeded to unilaterally publish a Revised Coal Dust Tariff,⁴ a tariff that remains manifestly unreasonable.

Coal Shippers asked BNSF to engage in a Board-supervised mediation to address their concerns with the Revised Coal Dust Tariff.⁵ BNSF refused.⁶ The Board then initiated this Dust II proceeding and directed the parties to address several issues including: the validity of the science BNSF relied upon in determining and approving "safe harbor" sprays identified in the Revised Coal Dust Tariff; the absence of any cost sharing provisions in the Revised Coal Dust Tariff; the absence of any stated penalties for non-compliance in the Revised Coal Dust Tariff; and the placement of all Revised Coal Dust compliance liabilities on coal shippers.⁷

³ Dust I, STB Decision served March 3, 2011 ("Dust I Decision").

⁴ "Revised Coal Dust Tariff" refers to Item 100, entitled "Coal Dust Mitigation Requirements," as published on July 14, 2011 in Revision 016 to BNSF's Price List 6041-B, including subsequent revisions to date.

⁵ See Dust I, WCTL's Petition to Reopen and For Injunctive Relief Pending Board-Supervised Mediation at 2 (Aug. 11, 2011) ("WCTL Dust I Reop. Pet."); Dust I, Letter filed Aug. 23, 2011 (APPA, EEI and NRECA support WCTL's petition); *see also* Dust I, Letter filed Aug. 24, 2011 (National Coal Transportation Association ("NCTA") supports WCTL's petition); Dust I, Letter filed Aug. 22, 2011 (CURE supports WCTL petition). Arkansas Electric Cooperative Corporation ("AECC") also filed a pleading in Dust I on August 19, 2011 supporting WCTL's petition.

⁶ Dust I, BNSF Railway Company's Reply to Western Coal Traffic League's Petition to Reopen and For Injunctive Relief Pending Board-Supervised Mediation at 4, 16-19 (Aug. 23, 2011) ("BNSF Dust I Reop. Reply").

⁷ Dust II, STB decisions served Nov. 22, 2011 at 4 & n.5 and March 5, 2012 at 1-2.

In their opening Dust II submission, Coal Shippers demonstrated that the Board cannot approve the Revised Coal Dust Tariff “safe harbor” because it is based on arbitrary junk science; governing law and principles of fundamental fairness require that BNSF incur spraying costs; it is unreasonable for BNSF to continue to refuse to set forth proposed penalties for non-compliance, particularly in light of its public statements threatening to cut-off rail service; and mandating that shippers spray trains, and then placing all liability for this spraying on coal shippers, is unreasonable.⁸

In its opening evidence, BNSF ignores or obfuscates the merits. BNSF asks the Board to ignore “controversy about science.”⁹ BNSF argues that “[t]he Board should not get into the issue of cost sharing in this proceeding.”¹⁰ BNSF claims that the Board “has no authority” to address enforcement or liability issues.¹¹ Simply stated, BNSF wants the Board to make a rubber-stamp determination that the Revised Coal Dust Tariff is reasonable when it is clear the Revised Coal Dust Tariff is manifestly unreasonable.

Instead of tackling the merits, BNSF attacks Coal Shippers in general and WCTL in particular. BNSF repeatedly complains that this proceeding is producing

⁸ Dust II, Opening Evidence and Argument of Western Coal Traffic League, American Public Power Association, Edison Electric Institute and National Rural Electric Cooperative Association at 15-39 (Oct. 1, 2012) (“Coal Shippers Dust II Op.”).

⁹ Dust II, BNSF Railway Company’s Opening Evidence and Argument at 28 (Oct. 1, 2012) (“BNSF Dust II Op.”)

¹⁰ *Id.* at 26.

¹¹ *Id.* at 24.

“delay[.]”¹² However, the record clearly shows that BNSF is the cause of case delays. Coal Shippers asked the Board to mediate Dust II, not to litigate it, but BNSF refused to mediate.¹³ Had BNSF agreed to talk reasonably – rather than mandate arbitrarily – it is most likely that the Dust II issues could have been quickly resolved.

BNSF also complains that “WCTL does not speak for all coal shippers.”¹⁴ BNSF ignores the fact that WCTL is not the only shipper party in this proceeding. WCTL is joined by APPA, EEI, NRECA, and NCTA in opposing the Revised Coal Dust Tariff. Collectively, these organizations do “speak for” the vast majority of coal shippers.

Finally, BNSF asserts that it did work cooperatively with its shippers in developing the Revised Coal Dust Tariff.¹⁵ All coal shippers participating in this proceeding disagree, and, in any event, BNSF has made it clear that cooperation is a one-way street. As one of BNSF’s Vice Presidents put it, “the *substance* of operating rules is not a proper subject of negotiation between railroads and their shippers.”¹⁶

¹² See, e.g., BNSF Dust II Op. at 1 and Stevan B. Bobb Verified Statement (“Bobb V.S.”) at 2, 7, and 8.

¹³ BNSF Dust I Reop. Reply at 4, 16-19.

¹⁴ BNSF Dust II Op., Bobb V.S. at 8.

¹⁵ BNSF Dust II Op., Bobb V.S. at 6-7.

¹⁶ BNSF Dust I Reop. Reply, Bobb V.S. at 4.

Coal Shippers' reply responds to BNSF's opening submission, as well as the opening submissions made by AECC,¹⁷ NCTA,¹⁸ the United States Department of Transportation ("DOT"),¹⁹ Union Pacific Railroad Company ("UP"),²⁰ and Union Electric Company D/B/A Ameren Missouri ("Ameren Missouri").²¹

ARGUMENT

I.

THE REVISED COAL DUST TARIFF IS UNREASONABLE BECAUSE IT IS BASED ON JUNK SCIENCE

Coal Shippers demonstrated in Dust I that the coal dust mitigation standards in the Original Coal Dust Tariff were predicated on junk science, and that publication of a tariff based on junk science was an unreasonable practice. The Board agreed. As Coal Shippers demonstrated in their opening Dust II evidence, BNSF has made the same mistake again. The coal dust mitigation standards in the Revised Coal

¹⁷ See Dust II, Arkansas Electric Cooperative Corporation's Opening Evidence and Argument (Oct. 1, 2012), as supplemented (Oct. 18, 2012) ("AECC Dust II Op.").

¹⁸ See Dust II, Opening Submission of the National Coal Transportation Association (Oct. 1, 2012) ("NCTA Dust II Op.").

¹⁹ See Dust II, Opening Comments of the United States Department of Transportation (Oct. 1, 2012) ("DOT Dust II Op.").

²⁰ See Dust II, Opening Evidence and Argument of Union Pacific Railroad Company (Oct. 1, 2012) ("UP Dust II Op.").

²¹ See Dust II, Opening Evidence of Union Electric Company D/B/A Ameren Missouri (Oct. 1, 2012) ("Ameren Missouri Dust II Op.").

Dust Tariff are based on junk science, and publication of a tariff based on this junk science is an unreasonable practice.²²

A. The Board Cannot Ignore Science

In Dust I, BNSF asked the Board to ignore the overwhelming evidence of record submitted by Coal Shippers demonstrating that BNSF's collection and analysis of air sample emissions were based on junk science.²³ The Board wisely declined BNSF's invitation and relied on Coal Shippers' evidence in rejecting the Original Coal Dust Tariff.²⁴

In its opening Dust II submission, BNSF again asks the Board to avoid delving into "controversy about science."²⁵ The Board must – once again – decline BNSF's invitation. BNSF is proposing to require shippers to spray trains based on the results of studies it undertook to collect and analyze air samples. BNSF is in the railroad business, not the emissions testing business, and its collection and analysis procedures clearly illustrate that BNSF has no idea how to properly collect and adequately measure air sample emissions.

²² See Dust I, Reply Comments of the United States Department of Transportation at 1 (April 30, 2010) ("DOT Dust I Reply") (to obtain regulatory approval, the "tariff rule at issue must be reasonable, which means that the Board must be satisfied that the methodology on which it is based is sound").

²³ See, e.g., Dust I, BNSF Railway Company's Reply Evidence and Argument at 4 (April 30, 2010) ("the Board does not need to referee the technical debate between BNSF's and the shippers' witnesses").

²⁴ Dust I Decision at 13.

²⁵ BNSF Dust II Op. at 28.

The Board cannot approve a coal dust emissions tariff that is based on faulty air emission testing and analysis, a point that DOT emphasized in Dust I:

[A]s a legal matter . . . the Board must be satisfied that BNSF's methodology and results are sound. In other words, that collection, measurement, and analysis of coal dust, as well as the translation of these data into quantitative limits, all have a well-grounded scientific basis such that they accurately capture the extent of the emissions and effectively redress their impact. . . BNSF's emission limits would be unreasonable if they were based upon faulty collection, measurement, or analysis of coal dust emissions

DOT Dust I Reply at 6.

The law here is supported by principles of fundamental fairness. BNSF is asking the Coal Shippers to expend millions of dollars annually to spray their trains with BNSF-approved surfactants. It is manifestly unfair and unreasonable to make such a request where, as here, the request is predicated on faulty air emission testing and analysis.

B. BNSF's Air Emission Testing and Analysis are Fatally Flawed

The Revised Coal Dust Tariff contains a list of BNSF-approved surfactants.²⁶ BNSF claims that proper application of these surfactants will reduce coal dust emissions from moving coal trains by 85%.²⁷ Surfactants were included, or not included, in BNSF's approved list based on crude air emission testing and analysis

²⁶ See *id.* at Appendix B.

²⁷ See *id.*, § 3.B. ("An acceptable topper agent is one that has been shown to reduce coal dust loss in transit by 85%. Appendix B to this publication lists the topper agents that meet this criteria.").

performed by BNSF in 2010 (as part of its “Super Trial”) and in 2011 (using its Super Trial procedures).²⁸

In its opening submission, BNSF offers a nonsensical defense of its testing and analysis. BNSF concedes that its testing was not sufficiently accurate to “predict[] the specific quantity of coal dust that could be expected to be blown off a particular train” but claims that this failure is “irrelevant” because its testing was sufficiently accurate to determine “the relative amount of coal dust blown out of treated and untreated cars on the same train.”²⁹

If, as BNSF concedes, its testing was not sufficiently accurate to determine “specific quantities” of coal dust being emitted from a moving coal car, how can BNSF accurately determine the “relative amount” of coal dust being emitted by a treated or untreated coal cars, which relative amounts are, of course “specific quantities” of coal dust? Of course, it cannot.

This conclusion is fully supported by Dr. Mark Viz, one of the nation’s leading experts on coal dust emission testing. Dr. Viz carefully reviewed BNSF’s 2010/2011 testing and analyses. He concluded, for the reasons fully set forth in his opening verified statement, that this testing and analysis “cannot be used to scientifically establish the amount, if any, of fugitive particulate emissions from railcars with certainty,

²⁸ See Coal Shippers Dust II Op., Verified Statement of Dr. Mark J. Viz (“Viz V.S.”) at 6; BNSF Coal Dust II Op., Verified Statement of William VanHook (“VanHook V.S.”) at 12. The 2011 testing was conducted “using the same basic procedures as those used in the Super Trial.” *Id.*

²⁹ Dust II, BNSF Op. at 29 (internal quotation marks omitted).

reliability or repeatability, nor can they be used to scientifically establish the quantitative effectiveness (in terms of percent reduction in emissions), if any, of the application of coal dust suppressants.”³⁰

C. BNSF’s Diversionary Tactics Cannot Rehabilitate its Flawed Emission Testing and Analysis

BNSF approved or disapproved surfactants based on its fatally flawed air emission testing and analysis. BNSF attempts to divert the Board’s attention away its flawed testing and analysis by making a series of irrelevant assertions:

- BNSF argues that the Board should accept its flawed testing results because some coal shippers received “Super Trial” spray data and these shippers “did not disagree” with BNSF’s analysis of the data.³¹ Shippers that saw BNSF’s test data and results were in no position to agree or disagree with BNSF’s findings because they did not have enough information to do so. As previously explained by a representative of one shipper that participated in BNSF’s Super Trial:

[P]articipating shippers did not control the methods BNSF selected to test the effectiveness of particular sprays, nor did we have access to the statistical analyses that BNSF used to evaluate the data it was collecting from the test trains. Shippers had input into the sprays that were selected for testing, and saw the study results, but otherwise the testing process was controlled by BNSF and its consultants.³²

³⁰ See Coal Shippers Dust II Op., Viz V.S. at 3; *accord* AECC Dust II Op. at 17-20.

³¹ See Dust II, BNSF Op. at 30.

³² See WCTL Dust I Reop. Pet., Verified Statement of Duane L. Richards at 5 (“Richards V.S.”); *see also* Ameren Missouri Dust II Op. at 11 (“BNSF initiated, managed, and otherwise exercised considerable control over the Super Trial”).

In addition, the coal shipper executives who participated in the Super Trial, like the BNSF executives who ran it, were not experts in air emission testing. *Id.*

Coal Shippers obtained the information necessary to evaluate BNSF's Super Trial testing procedures through discovery in this case, and had that information reviewed by a highly qualified expert (Dr. Viz). Dr. Viz has demonstrated that BNSF's testing and analysis were based on junk science, not valid science.³³

- BNSF argues that there are "other studies" that it says show that spraying coal reduces coal dust emissions.³⁴ However, these "other studies" are not the studies that BNSF used to determine whether a spray met its chosen 85% reduction standard, nor is there sufficient evidence in the record to evaluate them. The studies that BNSF used are its 2010/2011 studies and, as Coal Shippers demonstrate, these studies are fatally flawed.

As Dr. Viz explains, "[s]uppressants can possibly reduce fugitive emissions under certain circumstances."³⁵ However, the question raised in Dust II is whether "those reductions can be measured and verified using the techniques that BNSF and [its consultant] have attempted to use."³⁶ The answer to this question is clearly NO.

³³ See Coal Shippers Dust II Op., Viz V.S. at 7-30.

³⁴ See BNSF Dust II Op., Verified Statement of E. Daniel Carré and Mark Murphy at 9 (initial caps and bolding omitted) ("Carré/Murphy V.S.").

³⁵ See Coal Shippers Dust II Op., Viz V.S. at 4.

³⁶ *Id.*

For example, one of the approved sprays in the Revised Coal Dust Tariff is AKJ CTS-100.³⁷ BNSF tested AKJ CTS-100 in its Super Trial and concluded, based on its analysis of the Super Trial data, that it produced an 85% reduction in coal dust emissions.³⁸ The “thumbs up” given to AKJ CTS-100 was based exclusively on the Super Trial testing. Coal Shippers demonstrate that BNSF cannot be making “thumbs up” or “thumbs down” decisions based on its Super Trial testing because the testing was too flawed to do so.

- BNSF argues that some domestic and foreign railroads spray coal trains in some instances.³⁹ This is true, but it is equally true that most domestic and foreign railroads do not spray coal trains.⁴⁰ More importantly, BNSF has pointed to no instances where a carrier has adopted a public tariff requiring shippers to spray trains at the shipper’s expense based on fatally flawed carrier emission testing. Nor has BNSF cited any instance where a transportation regulator has approved such a tariff. This case

³⁷ Revised Coal Dust Tariff at Appendix B.

³⁸ See WCTL Dust I Reop. Pet., Richards V.S. at Attachment 8, p. 7. Attachment 8 is a copy of a document prepared by BNSF entitled, “Summary of BNSF/UP Super Trial 2010.” See also BNSF_COALDUST II_0001301-0001304 (included in Coal Shippers’ electronic addenda hereto).

³⁹ See BNSF Dust II Op., Carré/Murphy V.S. at 11-13.

⁴⁰ For example, BNSF points to Norfolk Southern Railway Company (“NS”) as one railroad that sprays trains. However, {

} See BNSF_COALDUST_0050682-BNSF_COALDUST_0050683, copy included in the Opening Evidence and Argument of Western Coal Traffic League and Concerned Captive Coal Shippers, Electronic Workpapers (March 16, 2010) (“WCTL Dust I Op.”) and in the reply electronic addenda hereto.

is unique because BNSF wants it both ways: BNSF wants *its* trains sprayed at *shippers'* expense based on *its* flawed studies.

- BNSF argues that shippers should pay to set up appropriate coal dust testing and analysis.⁴¹ This argument is absurd. BNSF publishes tariffs, not coal shippers, and if BNSF wants to adopt tariffs with emission standards, the burden is on BNSF – not its shippers – to adopt reasonable emissions standards based on reasonable analyses.

II.

THE REVISED COAL DUST TARIFF IS UNREASONABLE BECAUSE IT REQUIRES SHIPPERS TO BEAR ALL COMPLIANCE COSTS

BNSF's Revised Coal Dust Tariff, like the Original Coal Dust Tariff, requires that coal shippers bear all costs to comply with the tariff. The only BNSF-approved compliance option to date is profiling plus surfactant spraying, so compliance with the Revised Coal Dust Tariff terms requires that shippers pay to spray trains.

A. The Board Has the Legal Authority to Address Compliance Costs

The Revised Coal Dust Tariff is a common carrier tariff. BNSF concedes that the Board has the legal authority to address and set common carrier compliance costs.⁴² BNSF also observes that the Board lacks jurisdiction over transportation

⁴¹ BNSF Dust II Op. at 30. NCTA also points out that the costs of such testing would likely be very “significant.” NCTA Dust II Op. at 9

⁴² See BNSF Dust II Op. at 25.

provided under rail transportation contracts.⁴³ Had BNSF stopped there, Coal Shippers would be in agreement with BNSF. However, that is not where BNSF stops.

BNSF goes on to assert that under all of its contracts {

}⁴⁴ BNSF's assertions are wrong. The

record in this case clearly shows that BNSF and its contract coal shippers {

}⁴⁵

If the Board finds that the Revised Coal Dust Tariff is unreasonable because it places all compliance costs on coal shippers, BNSF will have the option of cancelling the tariff or modifying it to comply with the Board's directives. Either way, the Board's exercise of its jurisdiction will set the governing reasonable common carrier tariff terms { }

B. Compliance Costs Must be Borne by BNSF

Coal Shippers demonstrated in their opening submission that both the law, and the governing equities, required that BNSF bear the costs of compliance with any reasonable coal dust emissions tariff, *inter alia*, because the law requires the party seeking special car treatments to pay for those treatments and because it is fundamentally

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See BNSF_COALDUST II_00299941-00567178 in Coal Shippers' electronic addenda ({ })).

unfair for BNSF to reap all of the benefits of train spraying (in the form of reduced maintenance costs, if any) while incurring none of the spraying costs.⁴⁶

- BNSF argues that it “should not have to bear the costs of loading activities conducted by other parties over whom BNSF has no control.”⁴⁷ BNSF’s argument is nonsense. BNSF clearly exercises “control” over the loading process by issuing loading rules. However, BNSF’s control is not unfettered. BNSF’s loading rules must be reasonable and it is unreasonable for shippers to bear coal dust emission compliance costs.

As Coal Shippers explained in their opening submission, BNSF could establish a fair cost sharing arrangement by including a tariff provision stating that BNSF will reimburse shippers’ reasonably incurred compliance costs or by including a provision containing a reasonable reimbursement at a specified per ton allowance.⁴⁸

Under either approach, BNSF is protected from responsibility over costs it does not “control” because there is a cap on its payment obligation. If BNSF includes a provision calling for repayment of a shipper’s reasonably incurred compliance costs, BNSF’s payment obligation is limited to a shipper’s reasonably incurred costs. If its payment obligation is capped at a specific reasonable per ton allowance, its payment obligation is capped at that level.

⁴⁶ See Coal Shippers Dust II Op. at 24-33. NCTA has joined Coal Shippers in asking that the Board direct BNSF to pay compliance costs. See NCTA Dust II Op. at 13-14.

⁴⁷ BNSF Dust II Op. at 26.

⁴⁸ Coal Shippers Dust II Op. at 33.

Also, since the payment obligation caps would be set forth in a published tariff, the Board could intervene, as necessary, to resolve any disputes concerning the level of reasonably incurred costs, or the level of a reasonable allowance. Thus, there are no “control” issues that preclude the Board from doing the right thing in this case: finding BNSF’s Revised Coal Dust Tariff is unreasonable because it places all compliance costs on BNSF’s shippers.

- BNSF argues that shippers should bear compliance costs because mines bear the costs of coal dust mitigation at coal mines, and utility shippers bear the cost of coal dust mitigation at their utility plants.⁴⁹ What BNSF’s argument really demonstrates is that BNSF refuses to accept responsibility for its own actions. Coal mines pay for coal dust mitigation for dust emissions caused by their operations. Shippers pay for coal dust mitigation for dust emissions caused by their operations. However, BNSF refuses to pay for coal dust mitigation for dust emissions caused by its operations.⁵⁰

BNSF appears to be unique here. Coal Shippers are unaware of any railroad – with the exception of BNSF – that has published tariffs that call for shippers to

⁴⁹ See, e.g., BNSF Dust II Op. at 4-5.

⁵⁰ See also AECC Dust II Op. at 6 (“the safe harbor provision is unreasonable because it imposes on shippers the responsibility to prevent deposition of fugitive coal caused by the actions of the railroads, that is, by railroad operating and maintenance practices and infrastructure conditions that cause impacts, forces, and vibrations that shake the coal from the car”) (emphasis in original).

pay for coal dust mitigation caused by railroad operations.⁵¹ The reason why BNSF's actions are so controversial is that it is trying to foist spraying costs directly on its shippers, which is unprecedented in the coal transportation industry both in this country and around the world. Fortunately, the law and the equities preclude BNSF from doing so.

- BNSF argues that the shippers' costs to spray "will add only a small amount to the delivered cost of coal."⁵² Public estimates of the costs to spray trains range from \$50 to \$150 million annually.⁵³ These are hardly "small amounts." Moreover, the amounts are not so "small" that BNSF is willing to incur the costs, which it should as a matter of law and public policy.

- BNSF also claims shippers benefit from spraying because more coal stays in rail cars "for use in producing electricity."⁵⁴ The only support BNSF cites for this claim is {

}⁵⁵ {

⁵¹ UP has published one coal dust tariff rule that mimics the Revised Coal Dust Tariff rule. *See* UP Circular 6603-C, Item 216 (copy appended to Coal Shippers Dust II Op., in Counsel's Exhibit No. 2). However, it appears that UP has done so to comply with PRB Joint Line operating rules mandated by BNSF. *See* UP Dust II Op. at 4.

⁵² BNSF Dust II Op. at 3.

⁵³ *See* Dust I, Opening Statement of the National Coal Transportation Association at 6 (March 16, 2010). BNSF cites per ton spraying charges as running between { } in the last two years. *See* BNSF Dust II Op. at 19 (citing Counsel's Exhibit 4).

⁵⁴ BNSF Dust II Op., VanHook V.S. at 17.

⁵⁵ *See* BNSF Dust II Op. VanHook V.S., Exhibit 3 at 82 ({

}⁵⁶

III.

THE REVISED COAL DUST TARIFF IS UNREASONABLE BECAUSE IT CONTAINS NO ENFORCEMENT PROVISIONS

The Revised Coal Dust Tariff, like the Original Coal Dust Tariff, is unreasonable and unlawful because it does not inform shippers of the consequences of a shipper's failure to adhere to the tariff terms. BNSF's failure to include any enforcement provisions in the Original Coal Dust Tariff was one of the factors that led the Board to find that the Original Coal Dust Tariff was unreasonable. *See* Dust I Decision at 14 ("the [Original Coal Dust] tariff does not explain what consequences coal shippers would face if they are found to have tendered loaded coal cars to the railroad that subsequently released coal dust during transport").

} *See* BNSF_COALDUST_0034270, copy included in WCTL Dust I Op., Electronic Workpapers and in the electronic addenda hereto.

⁵⁶ *See* BNSF_COALDUST_0021514 to BNSF_COALDUST_0021547 at BNSF_COALDUST_0021534, copy included in Dust I, Rebuttal Evidence and Argument of Western Coal Traffic League and Concerned Captive Coal Shippers, Electronic Workpapers (June 4, 2010) and in the electronic addenda hereto. {

}

BNSF says that it “understand[s] the concern expressed by the Board in Coal Dust I that BNSF’s prior coal dust rule did not have any enforcement provisions,”⁵⁷ but nevertheless continues to ignore the Board’s directives by refusing to publish any enforcement provisions in the Revised Coal Dust Tariff.

- BNSF argues that it should not be required to publish enforcement provisions because a shipper should not be able to “choos[e] between compliance and non-compliance” with its mandated spraying.⁵⁸ However, “choice” is not the issue here. BNSF routinely publishes charges relating to a shipper’s failure to adhere to its loading rules. For example, if a shipper fails to load a train during BNSF’s specified unloading free time, a specified per hour detention charge applies.

BNSF does not publish enforcement provisions to assist shippers in making compliance decisions. BNSF does so because the law requires it to set out its common carrier enforcement policies in its common carrier tariffs.⁵⁹ Publication of dust mitigation enforcement terms is particularly important in this case in light of BNSF’s threats to stop service, or impose draconian financial penalties, for non-compliance with its coal dust tariff terms.⁶⁰

- BNSF also ominously states that even if BNSF believes a shipper is taking “good faith” measures to spray its trains, BNSF “may determine in the future that

⁵⁷ See BNSF Dust II Op., Bobb V.S. at 9 (emphasis omitted).

⁵⁸ BNSF Dust II Op. at 23.

⁵⁹ See Coal Shippers Dust II Op. at 34.

⁶⁰ *Id.* at 35.

penalties and incentives are necessary to improve compliance efforts.”⁶¹ Under this open-ended approach, BNSF determines when the “future” is now, what constitutes “good faith,” and what the “penalties and incentives” will be.

The Board cannot as a matter of law, and should not as a matter of public policy, permit BNSF to play cat-and-mouse with its coal dust tariff enforcement procedures, particularly in light of its not-so-veiled threats to stop service, or impose draconian financial penalties, for non-compliance.⁶²

- BNSF argues that it will provide any impacted shipper “60 days” advance notice before “adopt[ing] enforcement mechanisms.”⁶³ According to BNSF, the 60-day period would “allow shippers to challenge” the enforcement mechanisms.⁶⁴ Sixty days does not provide the Board sufficient time to rule on the legality of any BNSF “enforcement mechanisms.”

Nor should shippers, and the Board, be forced to address enforcement issues in the context of requests for an injunction or other forms of emergency relief. These requests tax the limited resources of the Board and impose heightened burdens of

⁶¹ BNSF Dust II Op. at 23-24.

⁶² *See also* DOT Dust II Op. at 8 (“BNSF may take the position that it may refuse to ship coal cars that do not meet the tariff terms, or take additional punitive steps. These issues may be relevant to the Board’s disposition here and should be considered in greater depth.”).

⁶³ *See* BNSF Dust II Op. Bobb V.S. at 10-11.

⁶⁴ *Id.*

proof on shippers.⁶⁵ The proper approach, which is the legally mandated approach, is for BNSF to include its enforcement policies and procedures in its common carrier tariffs before an emergency arises.

- Finally, BNSF argues that the Board “has no authority to get involved in the enforcement of contract commitments regarding coal dust mitigation.”⁶⁶

As discussed above, {

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IV.

THE REVISED COAL DUST TARIFF IS UNREASONABLE BECAUSE BNSF UNLAWFULLY ATTEMPTS TO INSULATE ITSELF FROM LIABILITY

The Revised Coal Dust Tariff provides that “[a]ny product including topper agents, devices, or appurtenance utilized by the Shipper or Shipper’s mine agents to control the release of coal dust shall not adversely impact railroad employees, property, locomotives or owned cars.” *Id.*, Item 100 at § 4. The Original Coal Dust Tariff contained similar text.

⁶⁵ See Dust I, STB decision served Aug. 31, 2011 at 2 (setting forth legal requirements that must be met to obtain an injunction).

⁶⁶ BNSF Dust II Op. at 24.

- BNSF argues that “[i]t is not unreasonable for shippers to take responsibility for the consequences of *their* loading practices.”⁶⁷ Of course, BNSF omits the fact that BNSF is mandating the involved loading practices – train spraying and profiling – and then mandating the sprays and profiles that must be used.

As Coal Shippers demonstrated in their opening submission, it is fundamentally unfair for BNSF to mandate train spraying, and train profiling, using BNSF-approved sprays and loading chutes, and then say that shippers are responsible for all liability arising from compliance with these mandates. BNSF wants it both ways: BNSF demands that shippers comply with its mandates, but then absolves itself from any corresponding responsibilities for liability to BNSF’s employees, property, locomotives or owned cars.⁶⁸

- BNSF also argues Coal Shippers “have misunderstood BNSF’s intent.”⁶⁹ According to BNSF, its “intent was not to hold shippers responsible for injury or damages associated with the proper use of topper agents” but “to hold shippers responsible for negligent or improper use of the toppers.”⁷⁰ BNSF’s “intent” does not

⁶⁷ BNSF Dust II Op. at 26 (emphasis added).

⁶⁸ See Coal Shippers Dust II Op. at 38.

⁶⁹ BNSF Dust II Op. at 27.

⁷⁰ *Id.*

square with the tariff text, which places all liability on shippers, including liability caused by BNSF's own negligence. A tariff is judged by what it says, not what is "intended."⁷¹

More importantly, BNSF's discussion of its "intent" confirms that BNSF is attempting to use its tariff writing power to fix, and limit, its tort liability. As Coal Shippers demonstrated in their opening submission, BNSF cannot use its tariff-writing power to limit its liability under state tort law, or other laws not administered by the Board.⁷² Ameren Missouri and NCTA provide complementary demonstrations in their opening submissions.⁷³

⁷¹ Dust I, STB decision served Aug. 31, 2011 at 2 n.2 (STB reviews compliance dates in the Revised Coal Dust Tariff based on the "language of the tariff" not BNSF's contrary "intent").

⁷² See, e.g., *Perishable Freight Investigation*, 56 I.C.C. 449, 483 (1920) ("tariff provisions which purport to . . . fix limitations of the carriers' liability . . . [are] generally objectionable"); *Rules, Regulations, & Practices of Regulated Carriers With Respect to the Processing of Loss & Damage Claims*, 340 I.C.C. 515, 520 (1972) (common carriers may not "limit their liability for negligence"); *Provisions on Vegetables & Melons, Transcontinental*, 340 I.C.C. 807, 815 (1972) ("it would be an unreasonable practice . . . for a railroad to establish . . . claims rules that are clearly inconsistent with their liability under established law"); *Wooden Grain Doors, Burlington N., Inc.*, 350 I.C.C. 768, 774-75 (1975) (carriers may not promulgate tariff rules governing liability for torts "over which this Commission has no jurisdiction").

⁷³ See Ameren Missouri Dust II Op. at 4 ("The Tariff . . . conflicts with normal tort law principles"); NCTA Dust II Op. at 15 ("to the extent BNSF seeks to broadly shift all risk to its customers, this could conflict with other statutory and regulatory schemes governing railroads").

V.

OTHER MATTERS

Coal Shippers respond to other BNSF assertions, as follows:

A. Concern Over BNSF's Unreasonable Coal Dust Practices is Industry-Wide

BNSF claims that “[o]nly a handful of shippers . . . have raised concerns about” BNSF’s dust tariff practices.⁷⁴ This assertion is mystifying. A broad coalition of coal shippers has challenged the legality of BNSF’s coal dust tariffs. In Dust II, this coalition consists of WCTL, APPA, EEI, NRECA (who have filed jointly as Coal Shippers) and NCTA. Collectively, these organizations represent the vast majority of Powder River Basin (“PRB”) coal shippers subject to the Original, and Revised, Coal Dust Tariffs.

B. Case Delays are BNSF's Fault

BNSF repeatedly complains that this proceeding is producing “delay.”⁷⁵ However, the record clearly shows that BNSF is the cause of case delays. Coal Shippers asked the Board to mediate Coal Dust II, not to litigate it, but BNSF refused to mediate.⁷⁶ Had BNSF agreed to talk reasonably – rather than mandate arbitrarily – it is most likely that the Dust II issues could have been quickly resolved.

⁷⁴ BNSF Dust II Op. at 3.

⁷⁵ *See, e.g.*, BNSF Dust II Op. at 1; Stevan B. Bobb Verified Statement (“Bobb V.S.”) at 2, 7, and 8.

⁷⁶ *See* BNSF Dust I Reop. Reply at 16-19.

C. BNSF Has Not Worked Cooperatively with its Coal Shippers

BNSF contends that it did work cooperatively with its shippers in developing the Revised Coal Dust Tariff.⁷⁷ All coal shippers participating in this proceeding disagree⁷⁸ and, in any event, BNSF has made it clear that participation is a one-way street. As one of BNSF's Vice Presidents put it, "the *substance* of operating rules is not a proper subject of negotiation between railroads and their shippers."⁷⁹

D. BNSF's Compliance Assertions are Wrong

BNSF claims that as a result of this proceeding, some coal shippers are "openly defying BNSF's requirements."⁸⁰ BNSF provides no support for this assertion, nor does BNSF acknowledge UP's position that UP shippers who entered into contracts prior to September 30, 2011 have no legal obligation to spray their trains.⁸¹

E. BNSF Relies on Dicta in the Board's Dust I Decision and Mischaracterizes the Decision

BNSF argues that "[t]he reasonableness of the [Revised Coal Dust Tariff] Safe Harbor provisions should be assessed based on the Board's factual and legal findings in Coal Dust I."⁸² In Dust I, the Board found that BNSF's publication of the Original Coal Dust Tariff was an unreasonable practice. Coal Shippers agree that the

⁷⁷ See BNSF Dust II Op., Bobb V.S. at 6-7.

⁷⁸ See Coal Shippers Dust II Op. at 2; NCTA Dust II Op. at 4; Ameren Missouri Dust II Op. at 3-4; AECC Dust II Op. at 5.

⁷⁹ BNSF Dust I Reop. Reply, Bobb V.S. at 4.

⁸⁰ BNSF Dust II Op., Bobb V.S. at 8.

⁸¹ See Coal Shippers Dust II Op. at 12.

⁸² BNSF Dust II Op. at 11 (initial caps, italics, and bolding omitted).

Board's review of the reasonableness of the Revised Coal Dust Tariff should be guided by the material factual and legal findings the Board made in rejecting the Original Coal Dust Tariff – *i.e.*, the tariff was not supported by sound science and lacked enforcement provisions.

However, BNSF does not reference these material “factual and legal findings” the Board made in Dust I. Instead, BNSF focuses on dicta in the Dust I decision addressing the asserted rationales tendered by BNSF in support of spraying PRB coal trains, as opposed to addressing PRB coal dust remediation through standard maintenance practices.⁸³ Coal Shippers disagree with the Board's analysis for the reasons set forth in WCTL's Dust I filings, which Coal Shippers hereby incorporate by reference and include in their reply electronic addenda.⁸⁴

Coal Shippers also disagree with BNSF's characterization of the Board's Dust I decision. For example, BNSF asserts that the Board concluded in Dust I that “containment . . . was the proper way of dealing with coal dust.”⁸⁵ In fact, what the Board said was that BNSF could, if it elected to do so, develop *reasonable* containment-

⁸³ BNSF Dust II Op. at 1-14.

⁸⁴ Coal Shippers also note that the Board gave “significant weight” to studies cited for the first time in DOT's Dust I rebuttal filing. Dust I Decision at 7. The Board typically will not consider new evidence tendered for the first time on rebuttal. Moreover, *none* of the cited studies even mentions, much less analyzes, coal dust ballast fouling.

⁸⁵ *See, e.g.*, BNSF Dust II Op. at 5.

based tariff standards.⁸⁶ The Board went on to hold that BNSF's Original Coal Dust Tariff was not a reasonable containment-based tariff.

F. BNSF's Poor Maintenance of the PRB Joint Line Led to the 2005 Joint Line Derailments

Following the tact it unsuccessfully utilized in Dust I, BNSF continues to refer to the two derailments that occurred on the Joint Line in 2005. BNSF claims that "presence of coal dust in the ballast of PRB rail lines was a contributing factor" in these derailments.⁸⁷

The Board correctly noted in Dust I that "FRA's conclusions in specific accident reports related to the 2005 derailments . . . do not refer to coal dust."⁸⁸ {

}. Coal Shippers incorporate by reference, and append in their electronic addenda, their extensive Dust I demonstration of BNSF's failure to properly maintain the Joint Line prior to the 2005 derailments. Since 2005, BNSF's Joint Line maintenance practices have improved, and there have been no new derailments.

G. BNSF Mischaracterizes its Train Profiling Studies

BNSF claims that its studies of load profiling show that profiling "has only a modest impact on coal dust losses in transit."⁸⁹ {

⁸⁶ Dust I Decision at 9.

⁸⁷ BNSF Dust II Op. at 5.

⁸⁸ Dust I Decision at 7.

⁸⁹ BNSF Dust II Op. at 15.

}⁹⁰ BNSF downplays

profiling because it moots the need for expensive train spraying.

CONCLUSION

Coal Shippers respectfully request that the Board find that BNSF's publication of the Revised Coal Dust Tariff is an unreasonable practice for the reasons set forth in their opening and reply submissions.

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Dated: November 15, 2012

⁹⁰ See Coal Shippers Dust II Op. at 22-23.

CERTIFICATE OF SERVICE

I hereby certify that this 15th day of November, 2012, I have served a copy of the Reply Evidence and Argument of Western Coal Traffic League, American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association by first-class mail, postage prepaid, upon all parties of record to this case.

A handwritten signature in black ink, reading "Andrew B. Kolesar III". The signature is written in a cursive style with a horizontal line at the end.

Andrew B. Kolesar III